NA 04-0073-C H/H Z.F. v South Harrison Comm Sch
Judge David F. Hamilton Signed on 9/1/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Z. F.,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:04-cv-00073-DFH-WGH
	)	
SOUTH HARRISON COMMUNITY SCHOOL CORPORATION,	)	
HARRISON COUNTY SPECIAL EDUCATION COOPERATIVE,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Z.F., a minor, by his parents and next friends, STEPHEN FOSTER and KARA FOSTER, Plaintiffs, v. SOUTH HARRISON COMMUNITY SCHOOL CORPORATION and HARRISON COUNTY SPECIAL EDUCATION COOPERATIVE, Defendants.	)	CASE NO. 4:04-cv-0073-DFH-WGH

MEMORANDUM OPINION

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491, requires that states, as a condition on receipt of certain federal funds, provide to all children with disabilities a "free appropriate public education." 20 U.S.C. § 1412(a)(1).[1] The education must be tailored to the individual needs of the child, as reflected in an individualized education program ("IEP") for each child. 20 U.S.C. § 1414(d). An IEP is a written statement developed by a committee consisting of the child's parents, teachers, and other special education advisors. The IEP sets forth the child's present educational abilities, annual and

[1]The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 302. The amendment took effect on July 1, 2005, and does not affect this case. Citations in this entry are to the statute prior to the amendment.

short-term goals for improvement, and the individualized instructional methods and services necessary to achieve those goals. 20 U.S.C. § 1414(d)(1)(A). Courts evaluate the "appropriateness" of the education a state proposes for a particular child, and thus its compliance with the IDEA, primarily by focusing on the IEP.

Parents or other interested parties may challenge a proposed IEP at a due process hearing before an independent hearing officer. 20 U.S.C. § 1415(f). Any party aggrieved by the decision of the hearing officer may appeal to a designated state administrative agency. 20 U.S.C. § 1415(g). Any party aggrieved by the result of the appeal may bring a civil action. 20 U.S.C. § 1415(i)(2).

This case involves a dispute between the parents of a child with autism and a public school district over whether the education the district proposed to provide for the child would have been appropriate under the IDEA. At a due process hearing, a hearing officer ruled in favor of the school district, finding that the proposed IEP complied with the IDEA. The ruling was upheld on administrative appeal by the Board of Special Education Appeals ("BSEA"). The parties have filed cross-motions for summary judgment. As explained below, the school district's proposed educational program substantially complied with the IDEA in most respects. However, the district's program did not entirely comply with the IDEA because the IEP did not provide the child with one-to-one assistance for his entire school day. Accordingly, the parties' motions are granted in part and denied in part.

Factual Background

Plaintiffs are Z.F. and his parents, Kara and Stephen Foster. Z.F. is autistic and is now seven years old. The defendants are South Harrison Community School Corporation and Harrison County Special Education Cooperative (the "district" or "school"). South Harrison Community School Corporation is a public school district subject to the IDEA and is the district in which Z.F. is entitled to attend school.

Z.F. was diagnosed with autism and central nervous system dysfunction when he was two years old. After that diagnosis, the Fosters researched methods to educate autistic children. They arranged for Z.F. to receive instruction at home with specialists trained in Applied Behavioral Analysis ("ABA").[2] Before Z.F. turned three years old, the district contacted the Fosters to set up a case conference to plan Z.F.'s transition to the school's pre-school program. Z.F. was then receiving 35 hours per week of at-home, one-to-one ABA instruction paid for by the Fosters. The district proposed to place Z.F. in its pre-school program for 12 hours per week. The Fosters objected to that plan and filed a request for a due process hearing.

[2]ABA is a method for educating autistic children. It involves intensive one-to-one interaction between the child and a trained ABA instructor. ABA focuses on separating complex skills into their simplest discrete components, and teaching these components to the child through repetition and positive reinforcement. When the child demonstrates mastery of the components, the goal becomes to "reassemble" the components back into the more complex skill.

While the Fosters' request for a due process hearing was pending, the district and the Fosters entered into a settlement agreement whereby Z.F. would continue his 35 hours per week of at-home ABA instruction which would be paid for by the district. Z.F. would begin a transition to the district's pre-school program by attending one day per week.

The district contracted with Claire Thorsen, an autism specialist, to observe Z.F. and to evaluate the school's pre-school program. Thorsen identified problems with the school's program. Based on her recommendations, the district hired Dr. Paul Roahrig as special education director and Bev Garrison as assistant director of special education.

At an August 2002 meeting attended by the Fosters, Garrison, Roahrig, and other district personnel, it was agreed to continue Z.F.'s program under the settlement agreement. As he demonstrated success, his time in pre-school would increase from one day per week with the end goal of attending four half days per week during the 2002-03 school year.

In April 2003, when Z.F. was five years old, the Fosters and district personnel convened a case conference to begin to develop Z.F.'s IEP for kindergarten during the 2003-04 school year. Angela Miller, who was to be Z.F.'s special education teacher, explained to the Fosters that the district envisioned a program beginning with a morning special education classroom for small group

and individual instruction, including methods designed to coordinate a transition from Z.F.'s current home-based ABA program. Z.F. would attend kindergarten with general education students in the afternoon.

The Fosters felt that morning kindergarten with a private ABA therapist shadowing Z.F., and continued at-home ABA instruction in the afternoon would better meet Z.F.'s needs. Dr. Roahrig pointed out that the district had already financed Z.F.'s at-home ABA instruction one year beyond that required by the settlement agreement. Mr. Foster stated his belief that the district wanted to discontinue Z.F.'s ABA instruction to save money. Dr. Roahrig explained that the present meeting was the beginning of a process and that further evaluation of Z.F. would help all concerned come up with the best plan for Z.F. R. 1085-86.

In May 2003, Angela Miller and Debbie Schneider, a kindergarten teacher at Z.F.'s school, observed Z.F. in his pre-school setting. Schneider worked with Z.F. on various tasks to determine his readiness for kindergarten. Z.F. also underwent other tests and evaluations. Dr. Greenlee, Ed.D., a former university professor in special education and education psychology, conducted achievement testing and assessed Z.F.'s adaptive behavior. The Fosters and several district therapists completed rating scales.

On May 19, 2003, the Fosters and district personnel, as well as several of Z.F.'s at-home ABA instructors, convened to review the evaluations. The

evaluators and observers explained their tests and observations. Dr. Roahrig advised the Fosters of their rights as parents under the IDEA and provided them with a copy of this information. The Fosters indicated they understood their rights. The parties agreed to reconvene on May 29, 2003, to develop an IEP for Z.F. for the 2003-04 school year.

The parties reconvened on May 29th. The district occupational therapist and physical therapist each recommended IEP goals and objectives. The district speech clinician proposed speech therapy twice per week with a small group and once per week for one-on-one therapy. Her recommendations included integration of ABA methods and collaboration with Z.F.'s ABA instructors. The Fosters agreed to these proposals. R. 1085-86.

At the May 29th meeting, kindergarten teacher Debbie Schneider explained that the district proposed to implement these goals in a daily program consisting of one half day of general education kindergarten and one half day in a special education Resource Room with a one-to-one assistant. The written IEP discussed at the meeting states that Z.F. would have a one-to-one assistant in the kindergarten for 2 hours daily, and in the Resource Room for 2.5 hours daily. R. 1267. The written IEP also states: "Percentage of instructional day receiving special education assistance: 72%." *Id.*

The kindergarten portion of the day would include standard kindergarten activities based on Indiana state standards, but with the support of an instructional assistant. Both kindergarten and Resource Room activities would involve school-based methodologies and curricula but would incorporate some ABA instructional methods.

Teachers Debbie Schneider and Angela Miller discussed the school's transition plan. They also explained that the school would continue to support Z.F.'s current ABA schedule through the end of the 2002-03 school year, and thereafter support his at-home ABA instruction until July 20, 2003. When Angela Miller returned from autism-related training in late July, she would meet with Z.F. and each of his private ABA instructors to observe their methods with Z.F. and to coordinate ABA methodology with the school's services. The IEP would be implemented at the onset of the 2003-04 school year.

The Fosters stated that they preferred the ABA to continue with an ABA-trained therapist present in the kindergarten classroom as Z.F.'s full-time instructional assistant. The Fosters wished to emphasize academic instruction and therefore saw time in the kindergarten as more important. District personnel stated their view that children with autism benefit from involvement in the general curriculum with special education resource supports and a collaborative approach.

According to the meeting notes, the meeting took on an "adversarial" tone. Eventually, it "did not appear that consensus was going to be reached." R. 1280. Dr. Roahrig indicated that all evaluations had been reviewed and that the school and the parents had presented "all IEP goals." *Id.* Because "it was clear that further discussion was not going to result in agreement today," Dr. Roahrig suggested that the Fosters review the materials and IEP goals presented overnight and meet with him at the school office the next day to determine if there was any way to reach agreement. *Id.* Later that day, the Fosters filed their request for a due process hearing. They did not meet with Dr. Roahrig the following day.

The district presented several expert witnesses at the due process hearing. Dr. John Umbreit, a Professor of Special Education at the University of Arizona with a specialty in ABA, reviewed Z.F.'s records and the proposed IEP. Dr. Umbreit opined that when a student who has received ABA therapy through discrete trial training demonstrates expressive language skills superior to his receptive language skills, as Z.F. had in some instances, it may indicate too much discrete trial training. R. 2853-54.

Claire Thorsen also testified for the district. Thorsen observed Z.F. in 2001 and later in August 2003. She made several recommendations regarding Z.F., including a supported kindergarten experience in the fall, use of ABA techniques, and use of peers as a source of modeling behavior.

Several experts testified for the Fosters at the due process hearing. Dr. Steven Luce is vice president for clinical programming, training and research at a corporation providing human services for individuals with various neurological impairments, brain injuries, and development disorders. He is a former teacher of special education and clinical professor in psychiatry at the University of Chicago. He uses ABA in his present work and has researched ABA as a method for educating children with special needs. Dr. Luce did not observe Z.F. His testimony was given over the telephone and was based on a written evaluation of Z.F. that had been provided to him and on a copy of the proposed IEP. Dr. Luce recommended that Z.F. receive 35-40 hours per week of one-to-one ABA therapy. R. 1745.

Dr. Carl Sundberg holds a Ph.D. in Applied Behavior Analysis Psychology and works extensively with autistic children in Indianapolis and elsewhere. Dr. Sundberg testified that the decision whether to include children with autism in settings with "regular typical kids" depends on the particular child. Dr. Sundberg opined that Z.F. needed another year of ABA therapy before being placed in the classroom for any significant amount of time per day. He stated there would be benefits to Z.F.'s attendance in the classroom, but that one to two hours in that setting would be more appropriate than half a day. He also opined that Z.F. would need an ABA-trained aide. R. 2442-47.

The independent hearing officer ("IHO") issued his decision on October 6, 2003. The IHO found that the district had committed some harmless procedural violations of the IDEA but had not denied Z.F. a free appropriate public education. The IHO concluded that "the proposed program, despite some minor adjustments that may be needed, is appropriate for the Student. It provides a 'floor of opportunity' for the Student to derive educational benefit from the program and is reasonably calculated for him to progress educationally." R. 2941. The IHO also found: "The Student would have a full-time aide to assist him and could help with the picture schedule that would be used." R. 2930 (IHO Finding of Fact 37).

The IHO ordered adjustments to the proposed IEP, including increasing the amount of weekly speech therapy. He ordered that the district was not obligated to pay for further ABA services after Z.F. completed the transition to kindergarten. The IHO noted that the district's autism team had become inoperative and that some members needed training. R. 2943. The IHO ordered the district to activate its autism team and to train its members in working with and educating autistic children, with training to be completed by the end of the Fall 2003 semester. TEACCH and ABA methods were to be included.[3] The IHO also ordered the district to hire an autism consultant to assist staff in developing instructional methods for Z.F. R. 2944-45.

[3]TEACCH is an awkward acronym for Treatment and Education of Autistic and Related Communication Handicapped Children. The TEACCH method differs from the ABA method in several respects. It places more emphasis on visual skills and less emphasis on directed one-to-one instruction, and makes extensive use of group instruction.

The Fosters appealed the IHO's decision to the BSEA, which substantially affirmed the IHO's decision. The Fosters now seek judicial review of the BSEA's decision pursuant to 20 U.S.C. § 1415(i)(2). The parties have submitted to this court the administrative record, including transcripts, testimony and documentary exhibits from the IHO and BSEA proceedings. The court has subject matter jurisdiction under 28 U.S.C. § 1331 and 20 U.S.C. § 1415(i)(3)(A).

Discussion

I. *The Standard of Judicial Review*

The IDEA requires the school district to provide Z.F. a "free appropriate public education." 20 U.S.C. § 1412(a)(1). For an education to be "appropriate" under the IDEA, the program set forth in the IEP (1) must be developed in compliance with the procedural safeguards set forth in the Act, and (2) in its substance must be "reasonably calculated to enable the child to receive educational benefits." *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982).

The plaintiffs claim that the school district's proposed IEP suffered from both procedural and substantive defects. As required by the IDEA, the plaintiffs pursued their challenge before the IHO and then the BSEA. Under the law, the BSEA's decision is the final decision that is actually the target of the plaintiffs' action for judicial review. A party challenging an administrative decision under the IDEA bears the burden of proof. *Alex R. v. Forrestville Valley Community Unit School Dist. # 221*, 375 F.3d 603, 611 (7th Cir. 2004), citing *Heather S. by Kathy S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997). In determining whether a party has met that burden, the reviewing court "shall receive the records of the administrative proceedings; shall hear additional evidence at the request of a party; and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B).

This statutory directive to consider additional evidence and to rule based on the preponderance of evidence places the court beyond the familiar boundaries for judicial review of administrative decisions. It is not, however, a directive to hear the case *de novo*, disregarding the administrative results and considering the evidence as if for the first time. The statute is not, the Supreme Court has made clear, "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. In *Rowley*, the Court construed § 1415(i)(2)(B) to require that courts give "due weight" to the administrative decision. *Id.*

Under the "due weight" standard of review, the degree of deference owed to the administrative officer's findings varies according to whether the reviewing court has taken additional evidence not before the hearing officer, and also according to the significance of any evidence taken. "At one end of the continuum, where the district court does not take new evidence and relies solely on the administrative record, it owes considerable deference to the hearing officer, and may set aside the administrative record only if it is 'strongly convinced that the order is erroneous.'" *Alex R.*, 375 F.3d at 612, quoting *Sch. Dist. of Wisconsin Dells v. Z.S.*, 295 F.3d 671, 675 (7th Cir. 2002). The more the reviewing court relies on additional evidence, the less it is obliged to defer to the hearing officer. Judicial review is "more searching the greater the amount (weighted by significance) of the evidence that the court has but the agency did not have." *Id.*, quoting *Z.S.*, 295 F.3d at 675. In this case, the plaintiffs have moved to admit

additional evidence but for reasons stated below, that motion is denied. Accordingly, the court gives considerable deference to the IHO and the BSEA. The BSEA's decision must stand unless the court is strongly convinced that the IHO and BSEA erred when they found that the school district's proposed IEP for Z.F. complied with the IDEA.

II. *Procedural Challenges*

The IDEA requires compliance with extensive procedural safeguards to ensure meaningful parental involvement in developing and reassessing a child's IEP so that the IEP addresses the child's individual needs. See, *e.g.*, 20 U.S.C. §1415 (a)-(d). Procedural flaws "do not automatically require a finding of a denial of a [free appropriate public education]. However, procedural inadequacies that result in the loss of educational opportunity . . . clearly result in the denial of a [free appropriate public education]." *Heather S.*, 125 F.3d at 1059, quoting *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992). Plaintiffs allege that (1) the proposed IEP improperly contained no academic goals; and (2) the district improperly disclosed confidential information regarding Z.F. The plaintiffs base their procedural challenges on Indiana's implementing regulations for the IDEA.

A. *Academic Goals*

Indiana's implementing regulations for the IDEA require that an IEP contain:

> A statement of measurable annual goals that describe what the student can be expected to accomplish within a twelve (12) month period, including benchmarks or short term objectives, related to: (A) meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum.

511 I.A.C. § 7-27-6(2). Plaintiffs claim that the proposed IEP violated that provision because it contained no academic goals or short-term objectives. Pl. Br. at 9, 16. The IHO concluded that the IEP contained appropriate measurable goals and objectives. R. 2940 (IHO Conclusion of Law 3). The BSEA sustained that conclusion. R. 3123 (BSEA, ¶ 7). The court is not convinced that the IHO and BSEA erred.

The proposed IEP contains several statements of measurable goals and short-term objectives. R. 1653-54; 1660-61. Included among these are statements of measurable annual goals and short-term objectives in the areas of: "Visual Motor Perception," which involves drawing shapes, symbols, and letters, R. 1653; "Receptive and Expressive Language Skills," which involves identifying or stating colors, verbs, size, pictures, objects, and ideas, R. 1661; and "Articulation," including imitating the beginning and final sounds in words, phrases and sentences, and spontaneously producing beginning sounds in words, R. 1660. These goals were presented at the April 22, 2003, meeting and approved by the Fosters.

It is apparent from the meeting notes and other evidence that the Fosters did not consider these areas to be academic areas. It is also apparent that the district did consider these and other areas to be academic, or at least as necessary prerequisites to meaningful academic progress in kindergarten.

The IEP states Z.F.'s academic skills "are sufficient for a regular [kindergarten] curriculum. Areas of concern are social/peer behaviors and expressive/receptive language. Fine and gross motor skills will also need to be addressed." R. 1651. At the due process hearing, special education teacher Angela Miller was asked whether receptive and expressive language and social skills were "academic." She testified as follows:

> A: Yes, they are academic that would have been facilitated through their regular academics, if that makes sense.
>
> Q: Explain.
>
> A: Okay. If we have the basic kindergarten curriculum, and the student is learning something, and the autistic child needs more support in expressing those things, then those expressive goals will overlap with that kindergarten curriculum. That's where the assistant is going to come in. The . . . special education teacher is going to guide the assistant in overlapping those in the kindergarten classroom. When [Z.F.] came back in the special education classroom, the special education teacher would work on those skills. And if we see that through a task analysis that needs to be broken down, the special education teacher could go back and teach the skills previous to that to build up to that.
>
> Q: And again, correct me if I'm wrong, but isn't the time in the kindergarten class in large part generalizing the skills that he's learning in the special ed portion of his day?
>
> A: Yes. . . . And the chance to apply and generalize both.

Q: Okay. Is there . . . anything in this language area or social interaction, I call it behavioral area, that is not – could not be considered academics for him?

A: No. No, because they all need to be learned. They all have to be taught. So if you're considering academics, yes. Yes.

Q: Are these not building blocks that he has to learn . . . before he can move on?

A: Yes.

R. 2578-80. Claire Thorsen's testimony at the due process hearing was consistent with Miller's testimony. Thorsen repeatedly emphasized the necessity of core foundational language, socialization, and communication skills for children with autism, and Z.F. in particular, to prepare them for more complex learning.

The proposed IEP does not expressly list "Academic Goals" among its terms. But neither the IDEA nor 511 I.A.C. § 7-27-6(2) specify academic goals as an express requirement. Under the IDEA, an IEP must be tailored to the student's individual needs. Under section 7-27-6(2) the required goals must be "related to: (A) meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum." The IEP reflects the district's views on Z.F.'s individual needs and its priorities in meeting them. The court is not convinced that the BSEA or IHO erred on this point. See *Kings Local Sch. Dist. Bd. of Educ. v. Zelazny*, 325 F.3d 724, 730 (6th Cir. 2003) (affirming district court's ruling that IEP was appropriate despite lack of academic goals because evidence established that IEP team "concluded that it

was important for the program to focus on socialization, and organizational goals rather than academic ones").

B. *Confidentiality*

The plaintiffs also claim that they received an anonymous letter regarding their negotiations with the district over Z.F.'s education. The letter includes the following passages:

> I was in the hall a week or so ago and noticed the conference that was being held in the glass-enclosed room at the entrance of the building. I felt it was very unfair to you and your wife to hold a meeting where anyone walking by could view the process. At the time I thought to myself isn't this a breach of confidentiality? . . .
>
> My main reason for this note is the publicity your son has received via Ms. Miller and the confidentiality surrounding special education. It was common knowledge by early Friday morning that you were filing for due process and her version of your ludicrous demands, & what your son could and could not do from her observation. If she isn't aware of confidentiality then the assistant director most certainly should have been. I hope that you have a good lawyer . . . not connected to the Division of Special Ed.

R. 0632.

The plaintiffs also cite the hearing testimony of Jennifer Cox, another kindergarten teacher at Z.F.'s school. When asked when she first learned that the Fosters had filed for a due process hearing, Cox testified: "I knew there were things that were going on, because I knew from last spring." R. 2518. Cox was also asked in reference to the due process hearing: "So did you talk to anybody

else on the school staff about what's going on, what's the — ." She responded: "I'm sure we have all done that, yes." R. 2519.

Indiana's implementing regulations for the IDEA establish confidentiality requirements for information regarding students with disabilities involved in the IEP process. 511 I.A.C. § 7-23-1. Section 7-23-1 provides in pertinent part:

> (p) Except as specified in subsection (q), written and dated consent of the parent or eligible student shall be obtained before personally identifiable information is disclosed to anyone other than the parent, eligible student, or authorized public agency officials[.]
>
> (q) The public agency may allow access to, or disclose information from, an educational record without consent of the parent or eligible student under any of the following conditions:
>
> > (1) The disclosure is to authorized public agency officials whom the agency has determined to have legitimate educational interests.

The plaintiffs claim that the anonymous letter and Cox's testimony establish that the district violated section 7-23-1. The IHO found: "Although there was testimony about the anonymous letter, the case conference being in a glass-enclosed conference room, and gossip, there is not sufficient evidence to indicate that the Student's records were released or compromised." Accordingly, the IHO concluded the district had not violated section 7-23-1. R. 2943 (IHO Conclusion of Law 10). The BSEA affirmed. R. 3123, ¶¶ 3, 7.

The court is not convinced that the IHO or BSEA erred in finding that the plaintiffs had failed to meet their burden of proof on their breach of confidentiality

claim. First, section 7-23-1(q)(1) authorizes disclosure of personal information to "authorized public agency officials whom the agency has determined to have legitimate educational interests." Plaintiffs have not attempted to demonstrate that the district's alleged disclosures fell outside this exception. Neither the anonymous letter nor the testimony of Cox establish that any information was disclosed to anyone other than teachers and administrators at Z.F.'s school.

Second, the context of Cox's testimony regarding what she knew of the events of "last spring" does not establish that she was referring to anything other than the fact that an IEP was being developed for Z.F. in the spring of 2003. And her statement that "We have all done that, yes" refers to discussion regarding the fact that a due process hearing had been initiated. Angela Miller, who is assumed to be the "Ms. Miller" in the anonymous letter, testified that the letter contained falsehoods insofar as it accused her of disclosing personal information on Z.F. She also gave testimony, consistent with the testimony of Cox, that shows the development of Z.F.'s IEP did not occur in complete secrecy:

> Q: So have you gone around talking about the Foster's case to other people in the building?
>
> A: At the time of the last conference, May 29th, there were people that asked me. Did I respond to them? Questions were asked, was the conference completed, because most people knew we had gone through several conferences. The answers were given [by] myself and the kindergarten teacher and several of the other people present that no, the conference was not completed, and it was to be continued. It was our understanding when we left the meeting that because it was the second to last day of school, the conference would be continued with without [*sic*] us. That type of information, yes.

R. 2550. Nothing in the IDEA or Indiana's implementing regulations suggests that a level of secrecy is required that would make such basic knowledge among teachers and administrators within the school but beyond the student's committee an actionable breach of confidentiality. Such a requirement could place impractical and unrealistic burdens on districts engaged in IEP development with parents.

Finally, the letter is hearsay and it is anonymous. There is simply no basis to assess its origin, authenticity or credibility, much less to find that its insinuations of gossip and references to confidentiality are evidence of an actual breach of confidentiality. Angela Miller testified in person, under oath, and at length that the allegations in the letter were false. R. 2547-51. The court is not convinced that the BSEA erred in upholding the IHO's finding that the district did not commit a breach of confidentiality.[4]

III. *Substantive Challenges*

To qualify as "appropriate," under the IDEA, an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07; *Evanston Community Consol. Sch. Dist. v. Michael M.*, 356 F.3d 798, 802 (7th Cir. 2004). An IEP must be reasonably calculated to confer more than

[4]Even if there had been some breach of confidentiality it is far from clear that the appropriate remedy would be to vacate an otherwise adequate and lawful IEP.

illusory or trivial educational benefits. See *Rowley*, 458 U.S. at 192 (stating that access to public education must be at least "meaningful"); *Alex R. v. Forrestville Valley Community Unit School Dist. # 221*, 375 F.3d 603, 615 (7th Cir. 2004) (IEP must be "likely to produce progress, not regression or trivial educational advancement"); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988) ("'benefit' conferred by the [IDEA] and interpreted by *Rowley* must be more than *de minimis*"); *J.P. v. West Clark Community Schools*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002) ("reasonably calculated to confer educational benefit is not a *de minimis* standard").

At the same time, the IDEA does not require public schools to educate a child "to her highest potential." *Board of Education of Murphysboro v. Illinois State Board of Education*, 41 F.3d 1162, 1166 (7th Cir. 1994); see also *D.F. v. Western School Corporation*, 921 F. Supp. 559, 565 (S.D. Ind. 1996) ("'free appropriate public education' is not necessarily the best possible education, or one that maximizes the potential of each child with disabilities"). The IDEA guarantees a "basic floor of opportunity." *Rowley*, 458 U.S. at 201. Evaluation of the IEP's reasonableness focuses on the time it was drafted, without the benefit of hindsight. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); accord, *J.P. v. West Clark*, 230 F. Supp. 2d at 919.

The plaintiffs must show that the district's proposed program was not reasonably calculated at the time of its drafting to provide Z.F. with a basic floor

of educational opportunity. The plaintiffs cannot meet this burden by showing that the program they preferred would have been superior to the district's proposed program. A comparison of the two programs is irrelevant except to the extent it sheds light on the adequacy or inadequacy of the district's program. The inquiry is whether the district's program in substance complied with the IDEA.

The plaintiffs claim that the district's proposed program for Z.F. was not appropriate because: (a) the district's proposed teaching methods were inadequate; (b) district personnel were not adequately trained; (c) Z.F. was not ready to transition into half-day placement in a kindergarten classroom; and (d) the district's proposed classroom supports were inadequate because Z.F. would not have full-time assistance.

A. *Methods*

The district proposed a program for Z.F. that would eliminate the district's support for his at-home ABA instruction. The district's proposed program would also sharply curtail Z.F.'s access to ABA teaching methods in the classroom setting. According to the plaintiffs, this change in placement was inappropriate because: "The school has already adopted and paid for this methodology. The school itself had written this very program in three of [Z.F.]'s IEPs. . . . This is not a situation where the parents were requesting a new, untried program. They were requesting the continuance of a program that was already in place and already working." Pl. Br. at 13.

The question under the IDEA is whether the educational program proposed by the district was appropriate at the time it was drafted and proposed. The fact that a student's current program at that time was appropriate and effective obviously does not mean that any proposed alternative would be inappropriate. See *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997) ("The issue is whether the Richmond placement was appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer.") (citations omitted).

The plaintiffs presented several experts at the due process hearing who opined that Z.F. had made substantial gains in his intensive home-based ABA program, and that he could regress if his ABA instruction were stopped or sharply curtailed. Dr. Sundberg opined that Z.F. "definitely needs a good 40 hours of intensive [ABA per week]." R. 2449. He also testified that Z.F. needed ABA throughout the year. "If you take the summer off . . . not only is he going to regress, but that's major progress that's going to be lost." R. 2452-53. Jason Garner, a senior clinical supervisor for the Center for Autism and Related Disorders, had been in frequent contact with the Fosters and had done quarterly reviews of Z.F.'s progress under his ABA program. Garner testified that Z.F. had "most definitely . . . made very substantial progress" in his ABA program. R. 2480. When asked if suddenly stopping Z.F.'s ABA program could harm Z.F.,

Garner responded: "Absolutely, I think what you would see is . . . marked regression. . . . I guess the most alarming would be the fact that he would probably lose a lot of the skills that he has already learned." R. 2492-93.

On the other hand, Claire Thorsen had provided a report recommending kindergarten placement with supports for Z.F. When asked about maintaining his current ABA home program in lieu of classroom placement, she opined: "I don't necessarily professionally view this as a positive." R. 2790. According to Thorsen, it was critical that Z.F. have access to his peers:

> Socialization is probably the most difficult thing for a child with autism to learn. . . . [T]hey have a lot of difficult[y] really, truly reading the social facial expressions. They are highly dependent on specific verbalizations for those things. So the sooner you can start exposing a child to those particular aspects in a normal environment, the better these kids seem to do[.]

R. 2790-91. Special education teacher Angela Miller similarly emphasized the importance of socialization, particularly: "The types of skills that children need to succeed in the classroom, such as the ability to play with other children. . . . Also, we're talking about being able to socially and appropriately address someone, say hello, say, you know, the teacher's name, another friend's name, that type of thing." R. 2577-78.

Plaintiffs argue that this case is not a "methodological dispute" because the district's autism intervention program for Z.F. is impermissibly eclectic. Dr. Roahrig testified that the school would be employing a variety of methodologies,

including the TEACCH method and also including ABA techniques. R. 2136, 2143. Assistant Special Education Director Bev Garrison testified that the school would be using a variety of methodologies, including TEACCH and also including ABA techniques. R. 2199, 2201. Plaintiffs' counsel asked Garrison "Why pick TEACCH? Why not a different methodology than TEACCH?" Garrison responded that "From my research, TEACCH is one of the best in the country. People throughout the country move to North Carolina to put their autistic children in the TEACCH program. My research says this is a good program, it is a highly structured program very much like ABA." R. 2224. Abigail Johnson testified that she would be using a variety of methods, including TEACCH. R. 2312-14. The district's notes of the May 29th meeting state that teachers Debbie Schneider and Angela Miller explained: "Both Kindergarten and Resource Room will develop a coordinated procedure for Verbal and Behavior methods that include ABA activities along with the school-based methodology and curriculum." R. 1279. Angela Miller, who had received training in TEACCH, testified that the specific program for Z.F. "would have depended, once he got into school, on where we felt he was going to achieve the most and what programs we felt were going to benefit him." R. 2540.

This kind of flexible and varied approach is consistent with the IDEA's requirement that educational approaches be tailored to a child's individual needs. The IDEA does not specify any particular methodology and does not prohibit the use of multiple methods. The plaintiffs and their advisors clearly believe that an

ABA-based program would be of greater benefit to Z.F., but again, that is not the question here. The question is whether the IHO and BSEA erred in finding the program proposed by the school to be in compliance with the IDEA. The district's proposed varied and flexible approach to Z.F.'s education does not, without more, meet the plaintiffs' burden on this question. The fact that one side is especially fervent about its views does not transform this case into anything other than a methodological dispute. The plaintiffs have shown only an honest disagreement among professionals, several of whom have devoted their careers to educating children with autism spectrum disorders and related disabilities. The courts have repeatedly recognized that they should generally defer to the decisions of the state and local educational agencies in such disputes. See generally *Rowley*, 458 U.S. at 208-10 (reversing lower court decisions that substituted courts' views on issues of educational policy); *Beth B. v. Van Clay,* 282 F.3d 493, 499 (7th Cir. 2002) (educators "have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents"), quoting *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 296-97 (7th Cir. 1988) (where parents and school district disagree on the "most appropriate method whereby the education of the parents' handicapped child is to be facilitated," courts "must take great care to avoid displacing the educational policy judgments made by . . . state and local public education officials"); *Brown v. Bartholomew Consol. Sch. Corp*, 2005 U.S. Dist. LEXIS 3690, *35 (S.D. Ind. Feb. 4, 2005) (affirming administrative decision on similar choice between different methods for addressing autism

spectrum disorder), appeal pending, No. 05-1526 (7th Cir.); *J.P. v. West Clark*, 230 F. Supp. 2d at 939 (same).

B. *Training*

Indiana's implementing regulations for the IDEA require that "Professional and paraprofessional staff serving students with autism spectrum disorder shall receive specialized inservice training in this area." 511 I.A.C. § 7-26-2(d). The plaintiffs assert that IHO erred in finding that the district had not violated this provision. Pl. Br. at 22. Plaintiffs note that Abigail Johnson, who was to be Z.F.'s special education teacher in the fall of 2003 "has not fulfilled this requirement." *Id.*

Abigail Johnson testified to training and experience in teaching children with autism. R. 2295, lines 16-25 through 2298, lines 1-12. But Johnson's training is not at issue here. Johnson was not scheduled to be Z.F.'s special education teacher of record at the time the proposed IEP was presented to the Fosters in May 2003. At that time, Z.F.'s special education teacher of record was intended to be Angela Miller, who was transferred from Z.F.'s school shortly before the due process hearing. According to the district's meeting notes for the April 22, 2003, case conference, Miller informed the Fosters that both she and kindergarten teacher Debbie Schneider had been trained in teaching children with autism. R. 1084. Miller testified in more detail at the due process hearing regarding her specific training and experience in teaching children with autism. Miller had special education training in college and had attended several workshops "very specific to autism." At the time of the May 29 case conference she was scheduled to receive autism training in the TEACCH method in North Carolina, and she did

receive that training. R. 2533-34. Debbie Schneider also testified at the due process hearing about her training and experience teaching children with autism. She had attended a six-day workshop at the Center for Autism in Bloomington, Indiana. R. 2618. Dr. Roahrig also testified about his experience and training in this area. R. 2067-68. After review of the record, the court is not convinced that the BSEA erred in upholding the IHO's finding that the district did not violate 511 I.A.C. § 7-26-2(d).[5]

C. *Transition and Z.F.'s Readiness for Kindergarten*

The plaintiffs claim that placement in the kindergarten classroom was not reasonably calculated to enable Z.F. to receive educational benefits because he was not ready to attend kindergarten to the extent proposed by the district. The plaintiffs cite several sources of evidence available to the district and the IHO as evidence of Z.F.'s lack of readiness for kindergarten. Pl. Br. at 4-5. They cite this same evidence also in support of their argument that the IHO erred when he found that the plaintiffs had failed to show that the district's proposed transition plan was inappropriate. Pl. Br. at 7.

[5]As stated above at page 11, the IHO noted that the district's autism team had become inoperative and that some members needed training. R. 2943. The IHO ordered the district to activate its autism team and to train its members in working with and educating autistic children, with training to be completed by the end of the Fall 2003 semester. TEACCH and ABA methods were to be included. The IHO also ordered the district to hire an autism consultant to assist staff in developing instructional methods for Z.F. R. 2944.

First, the plaintiffs point out that Robin Lee, the district's own teacher of the Kindergarten Readiness Program, opined at the April 22, 2003, case conference that Z.F. did not have the necessary skills to benefit from attendance in the regular kindergarten classroom, even with supports. Yet the district, according to the plaintiffs, proposed that very placement just weeks later at the May 19, 2003, meeting. Pl. Br. at 3, ¶¶ 6-7.

Z.F. had undergone significant testing and observation in those intervening five weeks. Angela Miller and Debbie Schneider observed Z.F. in his pre-school setting. Schneider worked with Z.F. on various tasks to determine kindergarten readiness. Dr. Greenlee conducted achievement testing and assessed Z.F.'s adaptive behavior. The Fosters and several district therapists completed rating scales.

Furthermore, the record does not clearly show that Robin Lee was of the opinion attributed to her by plaintiffs. Lee testified at the due process hearing that she did not write the statement attributed to her by the plaintiffs and then was asked what she meant by the statement she actually made: "Meaning that having the resource room to help him is what it meant, meaning that he wasn't necessarily ready to go into the four-year-old classroom without special needs assistance. That's what was meant by that." R. 2322-23. The district did not propose to send Z.F. to kindergarten without special needs assistance or without a portion of his day spent in the Resource Room. Moreover, Lee's testimony

makes clear that she was of the opinion at the time of the hearing that the district's proposal was more appropriate for Z.F. than the Fosters' preferred program. R. 2341-44. Lee's statements do not show that Z.F. was not ready for the program proposed by the district.

Plaintiffs next cite the testimony of Dr. Roahrig, the district's Director of Special Education. According to plaintiffs, Dr. Roahrig testified that he did not agree with the statement that Z.F.'s academic skills "are sufficient for a regular K classroom." Pl. Br. at 14, citing R. 2096. The record makes clear that Dr. Roahrig stated that he did not "entirely" agree with that statement. In context, it is clear that Dr. Roahrig was responding to what he perceived to be a question directed to Z.F.'s readiness to attend a mainstream kindergarten *without* supports. *E.g.*, R. 2096, lines 2-5 (Q: Was Z.F. "ready for a mainstream setting in kindergarten"? A: "Not without conditions, no."). The district never proposed that Z.F. unconditionally attend mainstream kindergarten. Dr. Roahrig's statements do not show that Z.F. was not ready for the program proposed by the district.

Plaintiffs next point to the statements of Dr. Stephen Luce, who testified via telephone at the due process hearing. Plaintiffs state that Dr. Luce "testified on page 57 of the transcript that if Z.F. was placed in a regular education classroom before he was ready, then regression could occur." Pl. Br. at 5, citing R. 1724. First, the statement assumes the conclusion at issue. Second, Dr. Luce's testimony on page 57 was not in reference to Z.F. or on any knowledge of Z.F.

possessed by Dr. Luce. It was a general statement about autistic children.[6] When Dr. Luce later in the hearing discussed the possibility of regression with respect to Z.F. he made the tautological observation that "if he was not able to benefit from the setting, it would be detrimental." R. 1746. Dr. Luce indicated that he "would defer to the people that are working with him" as to whether Z.F. could benefit from a regular classroom setting. *Id.*

When asked specifically whether he agreed that Z.F. was ready for attendance in the kindergarten classroom, Dr. Luce stated that Z.F. was not ready academically for the regular classroom setting "without a considerable amount of support in addition to being among his age-matched peers." R. at 1723. When asked what kind of support, Dr. Luce stated that ABA should be continued if he was benefitting from it. He also stated: "And if he was able to benefit from contact with peers, either with or without disabilities, *I would be placing him in a setting like that*, with support if he's not able to benefit independently." R. 1723 (emphasis added).

Plaintiffs next cite the hearing testimony of Dr. Carl Sundberg. Dr. Sundberg opined that Z.F. needed another year of ABA before being placed in the classroom. R. 2445. But he also stated: "I'm not saying there are not going to be

[6]Dr. Luce had never met or observed Z.F. His testimony at the due process hearing was based on his apparently cursory review of the proposed IEP and a few other documents which he "didn't spend a lot of time on" and "quickly [went] through" and "really didn't understand, frankly." See R. 1719-20.

benefits from being in the classroom." *Id.* This qualification, of course, goes to the core question in this case: whether the benefits of the school's proposed program would meet the minimum requirements of the IDEA. Dr. Sundberg responded yes when asked if just a few hours in the classroom would be "more appropriate" than a half day. R. 2445. But again the question is whether the school's proposal was appropriate, not whether the parents' preferred approach was more appropriate.

Dr. Sundberg was asked to compare the benefits of a program involving a half day in the regular kindergarten classroom with a program of full-time ABA. His response makes clear his preference for an ABA-trained aide in the classroom, but does not support the plaintiffs' claim that Z.F. was not ready to be placed in the classroom:

> Well, of course, we're talking kindergarten with – much of it is going to depend on who is with him. Is that person who is with him in kindergarten – because much of ABA is done in the natural environment, so you can sit at the table and do the standard discrete trials. I like to suggest that half of the time be worked on in a natural environment. I would call a classroom setting, that would be more of a natural environment. So if you have someone that is well-trained and able to take advantage of the natural situation and work on those things, that would make a huge difference. . . . [A] half day of kindergarten, may slow progress on the ABBLS down, but if it's done right and done well with a well-trained aide, there would be some other benefits.

R. 2446-47. Elsewhere, Dr. Sundberg opined that Z.F. needs 40 hours of intensive ABA therapy "whether it's in the natural environment, incidental teaching, at home, *in the school*, but a lot of learning opportunities per day." R. 2449 (emphasis added). In short, Dr. Sundberg's testimony goes to the question

of the appropriate method of teaching Z.F., but does not show that Z.F. was not ready for half day placement in the classroom with appropriate supports.

Finally, Dr. Larry Raskin, Ph.D., a licensed clinical psychologist, reviewed Z.F.'s records and saw Z.F. in his office on August 5, 2003. Dr. Raskin concluded that Z.F. "cannot function academically or socially in a regular classroom setting. Further, an inappropriate school placement would most probably exacerbate his problematic behavior." R. 0662.

Dr. Raskin's use of the phrase "regular classroom setting" does not address the question whether placement in a classroom setting with additional supports, as proposed by the district, would be appropriate. Dr. Raskin's comment about "an inappropriate school placement" also assumes the relevant conclusion.

Additional substantial evidence in the record and in testimony before the IHO supports the district's conclusion that Z.F. would receive meaningful educational benefit from placement in kindergarten classroom with additional supports as proposed by the district. The May 19, 2003, case conference notes show that Debbie Schneider, the kindergarten teacher who has taught other children with autism in her classroom, observed and spent time interacting with Z.F. Schneider opined that Z.F. would be able to attend the half-day kindergarten. R. 1276. Angela Miller also opined at the May 19th meeting as well as at the May

29th meeting and in her testimony before the IHO that Z.F. was ready to attend kindergarten with supports. R. 1277, 2527-28.

Dr. Greenlee, a former university professor in special education and education psychology, performed an evaluation of Z.F. for the district. Dr. Greenlee recommended in his evaluation to "Mainstream [Z.F.] as much as possible with non-disabled peers." R. 1153. At the due process hearing, Dr. Greenlee opined throughout his testimony as to the appropriateness of a classroom setting with supports. *E.g.*, R. 2254; 2279-80; 2291.

Dr. Umbreit, professor of special education with an emphasis in ABA, testified at the due process hearing as to the benefits of transitioning Z.F. from the home-based to the regular school setting. *E.g.*, R. 2840-42. Finally, Claire Thorsen observed Z.F. in August 2003 and concluded: "He does have some of the beginning information required of a kindergartener. The question remains as to whether it will generalize across settings, instructors, peers, and tasks." R. 1352. She recommended that Z.F. "Begin a supported kindergarten experience in the fall." *Id.*

The evidence cited by the plaintiffs does not establish that it was unreasonable to believe in May 2003 that Z.F. would be ready for placement in the kindergarten classroom in the fall with appropriate supports. Because Z.F.'s alleged lack of readiness for kindergarten was also the evidentiary basis for the

plaintiffs' challenge to the district's transition plan, the same evidence also fails to show that the district's transition plan was inadequate. Substantial evidence to the contrary was before the IHO at the due process hearing.

The plaintiffs assert one additional argument against the district's proposed transition plan. Claire Thorsen had testified as to certain components she usually suggests to schools developing transition plans. R. 2751-53. The plaintiffs contrast Thorsen's usual recommendations with the district's plan as described at R. 1662. According to the plaintiffs, the district's plan was not adequate "based on the school's own expert's testimony." Pl. Br. at 7-8. Thorsen's testimony does not carry plaintiffs' burden on this point. First, Thorsen's usual practice is not necessarily congruent with the "basic floor of opportunity" standard imposed by the IDEA. Second, the district's plan as described at R. 1662 is more general but is not necessarily inconsistent with Thorsen's testimony.

D. *Full-time One-to-One Assistance*

Plaintiffs next assert that the supports proposed by the school for Z.F.'s kindergarten classroom placement were inadequate, primarily because the district proposed one-to-one classroom assistance for Z.F. on less than a full-time basis. The plaintiffs are correct on this point.

The plaintiffs and their experts assert that less than full-time assistance for Z.F. would not be appropriate in light of his individual needs. Defendants' own

expert, Claire Thorsen, testified that she typically does not recommend full-time assistance for children with autism, but that she would recommend full-time assistance in Z.F.'s particular case. Dr. Roahrig also opined at the hearing that Z.F. would need a full-time assistant to make meaningful educational progress in a kindergarten setting. R. 2079-80.

The defendants have made no arguments that less than full-time assistance would be appropriate for Z.F. Rather, the defendants assert that their proposed program included all-day assistance for Z.F. According to defendants:

> [T]he IEP explicitly provides that the student is to have a one-to-one instructional assistant in the kindergarten classroom and the special education classroom. (R. 1652) To the extent there was any confusion on whether the child would be left unassisted during the day, Dr. Roahrig, Bev Garrison, and Angela Miller testified [at the due process hearing] that one-to-one instructional assistance would be provided *for the entire day*. (R. 2080-81; 2141; 2233-34; 2575).

Def. Br. at 25-26.

The proposed IEP contains an entry entitled "Special Services." Under "Description/frequency," the IEP states as follows: "Assistant in K Room – 2.0 hours daily" and "Resource Room – 2 ½ hours daily." The IEP also lists "72%" after the heading "Percentage of instructional day receiving special education assistance." R. 1652. Z.F.'s school day would begin at 8:30 a.m. and end at 2:45 p.m., for a total of 6¼ hours. R. 2530-31. The written IEP provides for 4½ hours of assistance. That amounts to a total of 1¾ hours when Z.F. would not be

provided a one-to-one assistant under the express terms of the district's proposed IEP. For one half hour of that time, Z.F. would be unassisted in the general education kindergarten classroom.

The IHO found as a matter of fact that "the Student would have a full-time aide to assist him. . . ." R. 2930 (IHO Finding of Fact 37). He also found that the proposed IEP "includes provisions for the Student to be in a general education setting with appropriate supports . . . ." R. 2939 (IHO Finding of Fact 72). It appears that in finding that Z.F. would have full-time assistance, the IHO was characterizing the hearing testimony of Angela Miller, not the contents of the proposed IEP itself. See R. 2930 (IHO Finding of Fact 37). Miller testified at the due process hearing that a full-time aide was going to be available if Z.F. needed one. R. 2575. Other district personnel also testified on this point. Dr. Roahrig acknowledged that 4½ hours might not constitute a full-time assistant, but that it was his belief that Z.F. was going to have a full-time assistant. R. 2081. Bev Garrison testified that Z.F. would have "[e]ither the aide or the teacher" with him throughout the day. "[W]e're not going to throw him to the wolves. There's always going to be somebody with him." R. 2233-34.

The problem with this testimony and the IHO's findings is that the proposed IEP quite clearly did *not* provide for a full-time aide. The district was not entitled to modify the proposed IEP by testimony in the hearing. See *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (district court erred by relying on

school's proposed supplement to IEP actually offered to parents); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (affirming decision not to consider placement the school never formally offered as IEP; requirement for formal offer of IEP "should be enforced rigorously").

The IHO was not entitled to rely on the testimony of district personnel at the due process hearing in finding that the district had proposed full-time assistance for Z.F. Courts have upheld IEPs where the IEP itself did not contain necessary information so long as all necessary parties possessed the required information. *E.g.*, *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990) (affirming district court's upholding of IEP despite missing information because "the parents and administrators had all of the information required by section 1401(19), even though it was not contained within the four corners of the IEP").

The court has found no evidence that the district informed the parents of its intentions to provide a full-time aide at any time before the due process hearing, notwithstanding the 4.5 hours per day proposed in the IEP at issue. The district personnel cited by the defendants testified when pressed by plaintiffs' counsel to their own belief that Z.F. would have a full-time aide, but none testified that the Fosters were informed at any time before the due process hearing that the district planned to provide a full-time aide.

The testimony of district personnel on the question of whether Z.F. would receive a full-time aide conflicts with the specific terms of the IEP. The district asserts that the testimony of its personnel remedied "any confusion on whether the child would be left unassisted during the day." However, while Angela Miller testified that a full-time aide would be provided, she also testified that in May 2003, "We were unsure whether he would require full-time assistance." R. 2575.

Permitting an IHO to rely on the testimony of district personnel to modify the explicit terms of an IEP could permit careless or indifferent districts to participate in the IEP process with a diligence short of that required by the IDEA. Allowing a school to clean up loose ends if the parents choose to proceed to due process could also encourage districts to play hardball with parents throughout the planning process, to hope for acquiescence, and then to appear much more reasonable and accommodating if the parents persist to the due process hearing stage.

The court is not implying that all school districts would be inclined to make use of such tactics, and the court is not implying that the defendants in this case were doing so. Nevertheless, the IDEA specifically requires districts to provide parents a formal written offer before initiating a placement for or otherwise providing a free appropriate education to a disabled child. See 20 U.S.C. § 1415(b)(1)(C). The requirement of a formal, written IEP "creates a clear record that will do much to eliminate troublesome factual disputes many years later

about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." *Union Sch. Dist. v. Smith*, 15 F.3d at 1526. A written IEP "will greatly assist parents in 'present[ing] complaints with respect to any matter relating to the . . . educational placement of the child.'" *Id.*, quoting 20 U.S.C. § 1415(b)(6).

For these reasons IHOs should not base their decisions on a school's attempt to modify by testimony the IEP it actually proposed, at least in absence of evidence that such information was already known by the parents when the IEP was presented to them. Cf. *County School Bd. v. Z.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005) ("The School District complains that the hearing officer ignored the fact that an aide was hired for Z.P. after the IEP was written. We believe that the hearing officer properly focused on what was actually contained in the written IEP when determining the appropriateness of that IEP."); *Knable v. Bexley City Sch. Dist.*, 238 F.3d at 768 ("The district court erred in relying on the [IHO's] finding that [the school district] had the capacity to offer [the child] appropriate placement. The district court should have limited its assessment to the terms of the draft IEP document itself. Although there was evidence in the record indicating what could have been provided . . . , only those services identified or described in the draft IEP should have been considered in evaluating the appropriateness of the program offered."); *Union Sch. Dist. v. Smith*, 15 F.3d at 1526.

The IHO erred in finding that the district's proposal provided full-time one-to-one assistance for Z.F. It did not. And he therefore erred in finding that the IEP provided "appropriate supports" for Z.F.'s placement in a general education setting. R. 2939 (IHO Finding of Fact 72). The BSEA erred in upholding both of these findings of fact. R. 3123, ¶ 3. Experts on both sides and district personnel appear to agree that Z.F. should not be left unassisted for any amount of time in a classroom setting. The court finds that the district's proposed IEP was not reasonably calculated at the time of its drafting to enable Z.F. to receive educational benefits. The plaintiffs have demonstrated that the IHO's Conclusion of Law 3, R. 2940-41, was in error, and that the BSEA erred in upholding it. R. 3123, ¶ 7. Accordingly, the BSEA's ruling must be reversed as to this issue. The question of a remedy is addressed below in Part VI.

IV. *Plaintiffs' Motion for Leave to Submit Additional Evidence*

The plaintiffs have moved for leave to submit additional evidence pursuant to 20 U.S.C. § 1415(i)(2)(B)(ii). They offer evidence relating to a May 4, 2004 meeting between the parties that occurred after the administrative proceedings under review in this case. According to the plaintiffs, at the May 4, 2004 meeting, "the school proposed a program that offered ABA therapy to the student." Pl. Mot. at 3 ¶ 11.

The statutory language applicable to plaintiffs' request is strong: the court "shall hear additional evidence at the request of a party." Nevertheless, appellate

courts have construed this language to give district courts at least some discretion not to hear additional evidence at the request of a party. See *Walker County School Dist. v. Bennett*, 203 F.3d 1293, 1298-99 (11th Cir. 2000) (summarizing law and identifying circuit split as to standard for submitting "additional evidence"). The Seventh Circuit has held that a district court has discretion to bar "additional evidence" at least for the purpose of preventing the judicial review from being transformed into a trial *de novo*. *Monticello School Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir. 1996), following *Town of Burlington v. Department of Education*, 736 F.2d 773, 791 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). Additional evidence should not be cumulative or repetitious, but such additional evidence may include, for example, evidence to fill "gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, [or] an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." *Town of Burlington*, 736 F.2d at 790.

The plaintiffs make the following assertions in their brief in support of their motion to submit additional evidence:

1. "[O]ne of the central issues in this case was the appropriateness of the use of Applied Behavior Analysis therapy with the student as a means of providing him with a Free Appropriate Public Education." Pl. Br. at ¶ 11.

2. "[D]uring the [due process hearing], the school contended, consistently and repeatedly, that ABA therapy was no longer appropriate for the student." *Id.* at ¶ 13.

3. The district's May 4, 2004, offering of ABA services to Z.F. "was inconsistent with its position during the hearing on what constituted appropriate educational services for the student." *Id.* at ¶ 15.

4. By offering "the very programming that it testified at [the] hearing was inappropriate for the student, the only logical conclusions are that either the school is offering what it believes is an inappropriate program for the student OR that the school believes the program is appropriate for the student but testified under oath a different proposition." *Id.* at ¶ 19.

As to the first assertion, the central issue in this case was not the appropriateness of ABA for providing Z.F. with a free appropriate public education. The central issue was the appropriateness of the district's proposed program.

As to the second assertion, the district did not contend that "ABA therapy was no longer appropriate" for Z.F. The district contended that a transition from full-time at-home ABA to a school-based program was appropriate for Z.F. District experts noted some possible negative effects of continuing with full-time at-home ABA, but that fact does not support plaintiffs' assertion. Plaintiffs' third assertion is flawed for the same reasons.

As to the fourth assertion, the plaintiffs' either/or logic is not persuasive. The reasonableness of an IEP is evaluated as of the time of its drafting. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). Plaintiffs' proposed additional evidence dates from a year and more after the events and the proposed IEP at issue in this case. "The IDEA recognizes children develop quickly and once correct placement decisions can soon become outdated." *Cory D. v. Burke County*

School Dist., 285 F.3d 1294, 1299 (11th Cir. 2002); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 850 (6th Cir. 2004) (district court "should take care to limit additional evidence to what is necessary for consideration of whether the original IEP was reasonably calculated to afford some educational benefit").

The plaintiffs proffered additional evidence is not like the additional evidence admitted by this court in *Brown v. Bartholomew Consol. Sch. Corp.*, 2004 U.S. Dist. LEXIS 8529 (S.D. Ind. May 4, 2004). In that IDEA case, the evidence proffered by the plaintiffs involved expert testimony of an autistic child's progress after a summer of intensive therapy and education. That evidence might have been probative of the reasonableness of the administrative decision made just a few months earlier. *Id.* at *4-6. Plaintiffs' proffered evidence here is qualitatively different. It involves only a suggestion by the district in the context of compromise negotiations while the plaintiffs' lawsuit was pending. The evidence has no probative value for the issues before the IHO and BSEA. Accordingly, it is not relevant to the issues before this court, and the plaintiffs' motion is denied.

V. *Fees*

The plaintiffs have requested attorney fees. The IDEA provides that a court may, in its discretion, award reasonable attorney fees to a prevailing party who is the parent of a child with a disability. 20 U.S.C. § 1415(i)(3)(B). The Fosters have prevailed here in part, and are entitled to attorney fees. They have prevailed on the limited issue of full-time assistance for Z.F. While this was more than *de*

minimis success, the court's resolution of this case has substantially favored the defendants. The court will determine the amount of a reasonable fee in light of that limited success. See *Monticello School Dist. No. 25*, 102 F.3d at 907 (affirming district court's denial of attorney fees where prevailing party's success was *de minimis*, and stating: "'although the *degree* of the plaintiff's success does not affect *eligibility* for a fee award' . . . the plaintiff's degree of success does impact the reasonableness of a fee award"), quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). Plaintiffs may submit a fee petition no later than September 15, 2005. Defendants may respond no later than September 29, 2005. Unless a party expressly requests an evidentiary hearing, the court expects to decide the amount of the fee based on the paper (actually, the electronic) submissions.

VI. *The Remedy*

While the Fosters' request for a due process hearing was pending, the district and the Fosters entered a settlement agreement whereby Z.F. would continue his 35 hours per week of at-home ABA instruction, which would be paid for by the district. That placement was in effect at the onset of this lawsuit and has been maintained as the status quo during the pendency of this case pursuant to the IDEA's "stay-put" provision, 20 U.S.C. § 1415(j). Because the substantive portion of this proceeding is now completed in the district court, the stay-put provision no longer applies to the plan adopted in the settlement agreement. The court is entering a judgment ordering the district to implement immediately the IEP as modified by the BSEA, with the further modification that defendants shall

provide Z.F. with full-time one-to-one assistance. That IEP as modified becomes the new status quo for purposes of the stay-put provision, so that the district will not be obliged to continue funding the at-home ABA program once the transition period described by the IHO has been completed. See *Andersen v. District of Columbia*, 877 F.2d 1018, 1023-24 (D.C. Cir. 1989) (after the district court rules, even if further appeal is pending, stay-put provision does not prevent implementation of district court's judgment).

In addition, of course, it will be necessary to adapt the modified IEP in light of the passage of time since the IEP was first drafted and the BSEA ruled. See, *e.g.*, *Van Scoy v. San Luis Coastal Unified School Dist.*, 353 F. Supp. 2d 1083, 1086 (C.D. Cal. 2005) (addressing effect of stay-put provision as applied to child moving from kindergarten to first grade). The passage of time has been considerable, especially in the context of the education of a young child with autism. The practical effect is that the district will need to meet with the Fosters to develop a new IEP consistent with the court's order. This must be done promptly. "The general policy under the IDEA is to resolve educational disputes as quickly as possible. . . . '[D]elay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development.'" *Powers v. Indiana Dept. of Ed.*, 61 F.3d 552, 556 n.3 (7th Cir. 1995), quoting 121 Cong. Rec. 37,416 (1975). The court's judgment will order that a new IEP conference be convened within 45 days and that the defendants decide on a new IEP within 30 days after the initial IEP conference. Also, nothing in this court's decision should

be deemed to modify the IHO's and BSEA's orders to the extent they ordered the district to enhance its staff's capacity to educate students with autism more generally.

Conclusion

Because the district failed to propose full-time one-to-one assistance for Z.F., the IHO erred in finding the district's proposed IEP was reasonably calculated to enable Z.F. to receive educational benefits. The decision of the BSEA upholding the IHO's decision is reversed on that point. However, the plaintiffs have not met their burden of proof on the remainder of their challenges to BSEA's decision and those portions of the decision are affirmed. Accordingly, the defendants' motion for summary judgment and the plaintiffs' cross-motion for summary judgment are granted in part and denied in part. Final judgment shall be entered accordingly.

So ordered.

Date: September 1, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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